IN THE

Supreme Court of the United States

October Term, 1942

No. 156

THE DETROIT BANK, formerly The Detroit Savings Bank, a Michigan Banking Corporation,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit

PETITIONER'S BRIEF

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Official Reports of Opinions Rendered in the Courts Below

The opinion of the District Court (R. 229-243) is reported in 41 *Fed. Supp.* 41.

The opinion of the Circuit Court of Appeals (R. 292-296) is reported in 127 *Fed.* (*2nd*) 64.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

This is a civil suit in equity arising under the laws of the United States providing for internal revenue and the

collection thereof (R. 100). The Respondent, The United States of America, instituted this action, as plaintiff, to foreclose its lien for Federal Estate Taxes against fifty parcels of real estate located in the City of Detroit, Michigan, all of which were at one time owned by John P. Paul and Lena Paul, his wife, as tenants by the entirety, to collect a deficiency in Federal Estate Taxes in the amount of $23,271.84 and interest thereon assessed against the estate of John P. Paul. The defendants are, encumbrancers (some of whom, including Petitioner, have foreclosed their liens and have become owners of the encumbered property as a result of their purchase at the foreclosure sale) of property which formerly belonged to John P. Paul and his wife, as tenants by the entirety, the State of Michigan and its political subdivisions, the County of Wayne and the City of Detroit, having liens against the property in question for unpaid real estate taxes and the descendents of John P. Paul and his wife (R. 229). The case was tried by the District Court upon a stipulation of facts supplemented by some testimony. The decree in the District Court in general granted the relief prayed for in the Bill of Complaint, except with respect to those parcels of real estate which were encumbered prior to the death of John P. Paul (R. 247-256). Petitioner and eight of the other defendants, including the State of Michigan and its political subdivisions, the County of Wayne and the City of Detroit, appealed from that decree to the United States Circuit Court of Appeals for the Sixth Circuit which affirmed the decree of the District Court (R. 289-291).

The statutory provision under which the jurisdiction of this Court is invoked is *Section* 240(*a*) *of the Judicial Code, as amended by the Act of February* 13, 1925, 43 *Stat.* 938, 28 *USC* 347(*a*). The judgment of the Circuit

Court of Appeals for the Sixth Circuit was entered on April 8, 1942 (R. 290), this case having been docketed in said Circuit Court of Appeals as No. 8988. A petition for certiorari directed to the Circuit Court of Appeals for the Sixth Circuit was filed with this Court on June 17, 1942, and said petition was granted on October 12, 1942. This case is on certiorari from the Circuit Court of Appeals for the Sixth Circuit. Since *Section* 240(*a*) *of the Judicial Code, as amended,* makes it competent for the Supreme Court of the United States to review by certiorari any case in a Circuit Court of Appeals, certiorari having been granted, the jurisdiction of this Court is established.

STATEMENT OF CASE

At the time of his death on May 5, 1926 (R. 229) John P. Paul and his wife, Lena Paul, owned, as tenants by the entirety, a considerable number of parcels of real estate located in the City of Detroit, Michigan (R. 230-231). Two of these parcels were then encumbered by mortgages held by Petitioner, and subsequently (between October 9, 1926, and June 22, 1931) Lena Paul, as survivor of herself and her husband, or the children of John and Lena Paul, to whom Lena Paul conveyed title, mortgaged ten additional parcels to Petitioner (R. 106, 107, 109-111). All of these mortgages were acquired by Petitioner for value, in good faith and without any knowledge that Respondent had or claimed to have any interest in the property covered by these mortgages (R. 239). Default occurred in all of these mortgages, and Petitioner thereupon proceeded to foreclose all of these mortgages and to become the purchaser of all of the encumbered

properties at the foreclosure sales thereof (R. 233, 234, 235-239). The foreclosure sales were all completed prior to May 4, 1936 (R. 233, 234, 235-239).

On May 4, 1936 (just one day short of the expiration of Respondent's lien), the present suit was instituted (R. v) and Petitioner then learned for the first time that Respondent claimed a lien on all of the property on which Petitioner had held mortgages and of which it believed itself to be the absolute owner (R. 239). The Bill of Complaint alleged and the evidence adduced upon the trial established the following facts: After Lena Paul (describing herself as "widow of John P. Paul and joint owner of all of his property") had filed, on July 5, 1927, an Estate Tax Return disclosing a liability of $3,450.00 (R. 229), which was duly paid (R. 229) the Commissioner of Internal Revenue on March 14, 1930 asserted a deficiency in Estate Taxes of $23,271.84 against her husband's estate (R. 229, 230). An appeal was taken to the Board of Tax Appeals and on November 4, 1932, the Commissioner's determination was upheld (R. 230). No appeal was taken from the decision of the Board of Tax Appeals, and on February 19, 1933, the amount of the deficiency, together with interest in the amount of $8,-080.20, was assessed against John P. Paul's estate (R. 230). No part of this deficiency was ever paid (R. 230). All but two of Petitioner's mortgages antedated the assertion of the deficiency by the Commissioner. The two mortgages which were made subsequent to the date of the deficiency notice were made two years prior to the assessment of the deficiency (R. 106, 107, 109-112, 229-230).

The case was tried by the District Court on a stipulation of facts supplemented by testimony. It found that Petitioner acquired all of the mortgages, which it held,

for value, in good faith and without any knowledge that Respondent had or claimed to have any lien on or with respect to any of the property covered by those mortgages (R. 239). The District Court further found that the lien asserted in the present proceedings arose at the date of John P. Paul's death and that, even though unrecorded, was superior in right to such of Petitioner's mortgages as were made subsequent to John P. Paul's death (R. 247). Accordingly the Court decreed that the property covered by these mortgages should be sold in satisfaction of the lien asserted by Respondent (R. 249). It determined, however, that Respondent's lien for Estate Taxes was subsequent in time and inferior in right to such of Petitioner's mortgages as antedated John P. Paul's death (R. 248).

The District Court's decision and that of the Circuit Court of Appeals are predicated on the theory that *Section* 315 (*a*) *of the Revenue Act of* 1926 (*Section* 827 (*a*) *of the Internal Revenue Code*) imposes a lien for the collection of Estate Taxes which is separate and distinct from the general tax lien created by *Section* 3186 *of the Revised Statutes* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code*) and that the provisions of the latter section, requiring that notice be filed to make the lien imposed by that section valid as against bona fide purchasers and encumbrancers, have no application to the lien referred to in *Section* 315 (*a*) *of the Revenue Act of* 1926. Both the District Court and the Circuit Court of Appeals rejected Petitioner's contention that, as so construed, *Section* 315 (*a*) *of the Revenue Act of* 1926 violated the Fifth Amendment of the Constitution of the United States and held untenable Petitioner's position that the lien described in that section in no event attaches to property held by a decedent and his spouse, as tenants by the entirety.

SPECIFICATION OF ERRORS RELIED ON

The Circuit Court of Appeals erred in the following respects:

1. In affirming the decree of the District Court.

2. In deciding that the lien referred to in *Section* 315 (*a*) *of the Revenue Act of* 1926 (*Section* 827 (*a*) *of the Internal Revenue Code*) is separate and distinct from that imposed by *Section* 3186 *of the Revised Statutes* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code*).

3. In determining that *Section* 315 (*a*) *of the Revenue Act of* 1926 (*Section* 827 (*a*) *of the Internal Revenue Code*) imposes a lien *ex proprio vigore*.

4. In determining that the lien herein sought to be foreclosed is valid against bona fide purchasers and encumbrancers for value, even though no notice of such lien is filed or recorded as provided in *Section* 3186 *of the Revised Statutes* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code*).

5. In following the decision of the Court in *United States v. Security-First National Bank of Los Angeles*, 30 *Fed. Supp.* 113 (*D. C. Cal.*) *Appeal dismissed* 113 *Fed.* (*2nd*) 491 (*C.C.A. 9th*).

6. In failing to determine that if *Section* 315 (*a*) *of the Revenue Act of* 1926 (*Section* 827 (*a*) *of the Internal Revenue Code*) is construed as imposing a lien which is effective against bona fide purchasers and encumbrancers for value (and particularly such purchasers and encum-

brancers from a surviving tenant by the entirety) without filing or recording, that section as so construed violates the Fifth Amendment of the Constitution of the United States.

7. In determining that the lien herein sought to be foreclosed attaches at any time to property formerly owned by a decedent and his spouse as tenants of an estate by the entirety.

SUMMARY OF ARGUMENT

Petitioner contends that the judgment of the Circuit Court of Appeals is erroneous for the following reasons:

1. The Circuit Court of Appeals erroneously decided that *Section* 315 (*a*) *of the Revenue Act of* 1926 (*Section* 827 (*a*) *of the Internal Revenue Code*) imposes a lien which is separate and distinct from that prescribed by *Section* 3186 *of the Revised Statutes* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code*). Actually the lien under foreclosure must be that imposed by the latter section for the former section imposes no lien *ex proprio vigore*, but merely describes certain incidents (such as duration and the property to which the lien attaches) of the lien imposed by *Section* 3186 *of the Revised Statutes* as applied to estate taxes. The legislative history of those two sections and the clearly defined Congressional policy of protecting bona fide purchasers and encumbrancers demonstrates beyond question that *Section* 315 (*a*) *of the Revenue Act of* 1926 should receive this

construction. This interpretation is consistent with statutory language; effectuates the intent of Congress and avoids the harsh and grossly absurd results which will follow from the construction of this section adopted by the Court below.

Since *Section* 3186 *of the Revised Statutes* (*and not Section* 315 (*a*) *of the Revenue Act of* 1926) is the generating source of the lien involved in these proceedings, that lien is inferior to the lien of the mortgages held by Petitioner because notice of that lien was not filed, as provided in that section, until long after the lien of those mortgages arose.

2. If the decision of the Circuit Court of Appeals properly construes the provisions of *Section* 315 (*a*) *of the Revenue Act of* 1926, that section as so construed violates the Fifth Amendment to the Constitution of the United States. This is so, not only because it thus imposes a secret lien, valid without recordation, against bona fide purchasers and encumbrancers, but also because protection against this secret lien is arbitrarily and capriciously denied to bona fide purchasers and encumbrancers from a surviving tenant of an estate by the entirety, while complete protection with respect to this lien is accorded innocent vendees and mortgagees from other transferees of property not subject to administration, the value of which is includable in the value of the decedent's gross estate for Estate Tax purposes.

3. Even if the interpretation accorded by the court below to *Section* 315 (*a*) *of the Revenue Act of* 1926 is proper and that section as so construed does not violate the Fifth Amendment of the Con-

stitution of the United States, Respondent is still not entitled to the relief granted it by the judgment which this Court is asked to review. Foreclosure was decreed against property which the decedent and his wife owned at the time of decedent's death, as tenants by the entirety, notwithstanding the fact that in no event does the lien under foreclosure at any time attach to property held in such a tenancy.

REFERENCE TO STATUTORY PROVISIONS

During the course of the pages of this brief which follow Petitioner will have occasion to refer frequently to *Section* 315 (*a*) *of the Revenue Act of* 1926 (*Section* 827 (*a*) *of the Internal Revenue Code*), *Section* 315 (*b*) *of the Revenue Act of* 1926, *as amended* (*Section* 827 (*b*) *of the Internal Revenue Code, as amended*), and *Section* 3186 *of the Revised Statutes, as amended* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code as amended*). In the interest of readability and economy of expression Petitioner will frequently refer to these sections respectively, simply as "*Section* 315 (*a*)," "*Section* 315 (*b*)" and "*Section* 3186." Those sections are set forth in an appendix to this brief.

ARGUMENT

I. The lien herein sought to be foreclosed is imposed by *Section* 3186 *of the Revised Statutes* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code*).

A

PREFACE

This branch of the case involves an interesting and difficult problem of statutory construction. The statutes to be construed are *Section* 315 (*a*) *of the Revenue Act of* 1926, *as amended* (*Section* 827 (*a*) *of the Internal Revenue Code*) and *Section* 3186 *of the Revised Statutes as amended* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code, as amended*).

The pertinent provisions of *Section* 315 (*a*) *of the Revenue Act of* 1926 read as follows:

> "* * *. Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. * * *."

The applicable portions of *Section* 3186 *of the Revised Statutes* are the following:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien

> in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * *."

It is Petitioner's position that *Section* 315 (*a*) imposes no lien *ex proprio vigore* and that the lien to which that section refers is not a separate and distinct lien, but is rather the lien imposed by *Section* 3186. It is Petitioner's further contention that Respondent, in the present proceeding, must be attempting to foreclose the lien prescribed by *Section* 3186 for that is the only lien which Congress has conferred upon it for the collection of Estate Taxes. Petitioner takes the position that the only purpose of *Section* 315 (*a*) is to prescribe certain incidents of the lien imposed by *Section* 3186, designed to adapt that lien, in so far as is necessary, to the collection of Estate Taxes.

If, in construing *Section* 315 (*a*), one were to confine one's self exclusively to the language used, one might with equal plausibility reach two different conclusions—one that that section was intended to impose a lien; the other that the section imposes no lien but merely describes certain attributes of a lien imposed by another statutory provision. The words and grammatical construction of that section describe the idea of duration and character of a thing theretofore in existence as aptly as they suggest the concept of creation.

The problem of statutory construction involves more than the application of dictionary definitions to the words in which a legislative enactment is couched. "The meaning of a sentence may be more than that of the separate words as a melody is more than the notes." *Gregory v. Helvering*, 69 F. (2nd) 809 (C.C.A. 2nd). Where, as in the instant case, the language of the statute is susceptible of two different interpretations, that interpretation should be selected which appears most consonant with the probable purpose of the legislative body which enacted it and which avoids absurd and unreasonable results. Competing interpretations of a statutory provision must be weighed in the light of legislative history and the manner in which that provision operates on transactions claimed to fall within the ambit of its intended operation. *Helvering v. New York Trust Co.*, 292 U. S. 455.

B

The Legislative History of *Section* 315 (*a*) *of the Revenue Act of* 1926, *as amended, and of Section* 3186 *of the Revised Statutes* clearly demonstrates that the former section was not intended to impose a lien *ex proprio vigore*.

The ancestor of modern Federal Tax Liens, conferred on Respondent to aid it in the collection of taxes which it imposes, is *Section* 3186 *of the Revised Statutes of the United States of* 1879. This section was a codification of an Act of July 13, 1866 in which the forerunner of *Section* 3186 *of the Revised Statutes* first appeared. See *c.* 184, §9, 14 *Stat.* 107. *Section* 3186 *of the Revised Stat-*

utes, therefore, dates from 1866. That section when enacted applied, and still applies, to "any tax" and imposes a lien on "all property" of the taxpayer. Its application is general in the broadest possible sense. It was in existence prior to the adoption of the Sixteenth Amendment to the Constitution of the United States and the Revenue Acts enacted thereunder, including those imposing Federal Estate Taxes. *Section* 3186 has, therefore, served as a nucleus around which were built subsequent lien provisions appearing in Revenue Acts imposing specific types of taxes. It is, therefore, important to examine the legislative process by which Congress built subsequent legislation about that nucleus.

Section 3186 (*which was the Act of July* 13, 1866, *c.* 184, §9, 14 *Stat.* 107, *as revised and amended by an Act of March* 1, 1879, *c.* 125, §3, 20 *Stat.* 331), originally provided as follows:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person."

Prior to the enactment of the first Revenue Act imposing an income tax pursuant to the Sixteenth Amendment to the Constitution of the United States, Congress by *Act* 451, *passed March* 4, 1913, *c.* 166, 37 *Stat.* 1016, added the following proviso to *Section* 3186 *of the Revised Statutes*:

"Provided, however, That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the District court of the district within which the property subject to such lien is situated: Provided further, That whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the counties of that State, and in the State of Louisiana in the parishes thereof, and in the States of Connecticut, Rhode Island, and Vermont in the office of the registrar or recorder of deeds or town or city clerk having custody of the land records of the towns and cities, then such lien shall not be valid in that State against any mortgagee, purchaser, or judgment creditor until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, or in the office of the registrar or recorder of deeds or town or city clerk having custody of the land records in the States of Connecticut, Rhode Island, and Vermont of the towns or cities within which the property subject to the lien is situated."

When Congress enacted the first income tax law pursuant to the Sixteenth Amendment in the Fall of 1913, it was confronted with the problem of selecting methods of enforcing the tax which it imposed. One of the most ancient and time-honored methods of enforcing collection of taxes was by the imposition of a lien. It is hardly to be assumed that Congress is marshalling methods of enforcement of the newly imposed income taxes dismissed from its consideration the ancient and efficient method of imposing a lien. The Common Law lien of the sovereign

for the collection of taxes has never existed in favor of the United States. *United States v. The State Bank of North Carolina*, 6 Peters 29; *Equitable Trust Company v. Connecticut Brass & Manufacturing Corporation*, 290 F. 712 (C.C.A. 2nd); *United States v. Middle States Oil Corporation*, 18 F. (2nd) 231 (C.C.A. 8th); *In Re Wyley Co.*, 292 F. 900 (N.D. Ga.). If the device of lien was to be included in Respondent's arsenal of weapons for enforcement, it was necessary that there be express statutory provision therefor. In providing the Government with a lien, Congress did what it did with respect to all other administrative provisions. It adopted a policy of taking existing statutory provisions applicable to Internal Revenue Taxes generally and made only such changes as were necessary to make them function efficiently in their new surroundings. It did not adopt a whole new set of administrative provisions, separate and distinct from those in force with respect to existing Internal Revenue Taxes. In short, it built its system of the administration and enforcement of income taxes into the existing scheme of administration and enforcement of other Internal Revenue Taxes.

In the existing scheme of things, it found *Section* 3186, which provided a lien for "all taxes" on "all property" of the taxpayer. This it found sufficient to arm those charged with the enforcement of income taxes with the desired lien. Congress did not enlarge or diminish the lien provided by *Section* 3186 but accepted it as it was. *Section* 3186 remains today the basic and indeed the only lien provision for the enforcement of income taxes.

In 1916, three years after the imposition of the first modern income tax, Congress enacted the first Federal Estate Tax. The policy of Congress of building into

the existing superstructure of methods of administration and enforcement of Internal Revenue Taxes generally, the system of administration and enforcement of a newly enacted tax, had not changd. In adopting a system of administering and collecting the newly imposed Federal Estate Tax, Congress started with the assumption that existing methods of administration and collection were to be adopted. Congress did not leave this matter to inference; it so provided in language which leaves no doubt of its intent. *Section* 211 *of the Revenue Act of* 1916, the second from the last section in Title II of that Act (which imposed the first Federal Estate Tax) provided as follows:

> "That all administrative, special and general provisions of law, *including the laws in relation to the assessment and collection of taxes* not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.'
>
> (Italics supplied)

One of the "laws in relation to the collection of taxes" then in existence was *Section* 3186, which provided a lien for "any tax" on "all property" of the taxpayer.

Is it reasonable to assume that, with *Section* 3186 before it, the express terms of which made that section applicable to the Estate Tax which it proposed to enact, Congress provided Respondent (by adopting *Section* 209 *of the Revenue Act of* 1916, the predecessor of and identical with *Section* 315 (*e*) *of the Revenue Act of* 1926), with a lien separate and distinct from and in addition to that already provided by *Section* 3186? Of is it more reasonable to suppose that by including *Section* 209 *in the Revenue Act of* 1916, Congress merely intended to

provide that the lien imposed by *Section* 3186 as applied to Estate Taxes should attach, not when the assessment list was received by the Collector, but rather at the date of the decedent's death, (see, *Rosenberg v. McLaughlin*, 66 F. (2nd) 271 (C.C.A. 9th)), and that the lien imposed by *Section* 3186 should from that time attach to the gross estate of the decedent and continue in existence (unless the tax was sooner paid in full) for a period of ten years. In view of the avowed Congressional policy of utilizing existing methods of administration and enforcement for newly exacted taxes rather than adopting new methods of administration and enforcement; the latter is the only reasonable construction.

This conclusion is reinforced by the obviously incomplete character of *Section* 315 (*a*). If Congress had intended that section to be a separate, distinct and self-operating provision, it is reasonable to suppose that the National Legislative Body would at least have specified in whose favor the lien therein mentioned runs. *Section* 315 (*a*) is, however, completely silent in this regard. Indeed, if that section is to be regarded as a self-contained entity, as Respondent contends, it would seem reasonable to conclude that the lien to which that section refers runs in favor of the Commissioner of Internal Revenue, since he alone is given authority to release the lien. In that event, the Commissioner of Internal Revenue and not the Respondent would be the proper party plaintiff in this action. The explanation of this apparent hiatus in *Section* 315 (*a*) must be that Congress in enacting that section did not intend to impose a lien but was merely describing certain attributes of a lien which it had already imposed by *Section* 3186 and which by the specific

terms of that section ran in favor of the United States. No less significant in this regard than the failure of *Section* 315 (*a*) to specify in whose favor the lien therein mentioned runs, is its omission of the following language (or language similar thereto) contained in *Section* 3186: "(including any interest, penalty, additional amount or addition to such tax, together with any costs which may accrue in addition thereto)." The inclusion of this language in *Section* 3186 embodies a Congressional judgment that the word "tax" standing alone is not sufficiently broad to include interest, penalties and the other additional amounts described in the parenthetical language quoted above. Respondent, in the present proceeding, does not limit its claim to the amount of the unpaid tax. It seeks to recover interest as well. This it is not entitled to recover if *Section* 315 (*a*) is separate and distinct from *Section* 3186. To sustain its right to recover interest, as well as its right to maintain this suit, Respondent is forced to borrow surreptitiously from *Section* 3186 to supply the deficiencies in *Section* 315 (*a*). Apparently Respondent looks on *Section* 3186 much in the same fashion as the English Gentleman of the Mid-Victorian Era regarded the money lenders who financed their improvidence. It gladly borrows the aid of that section when it finds such assistance necessary to achieve its purpose but denies both the debt and the lender when either seeks even a passing nod of recognition.

Section 3186 provided, when the *Revenue Act of* 1916 was enacted, and still provides that the lien imposed by that section shall attach when the assessment list is received by the Collector "unless another date is specifically fixed by law." With this provision in mind, Congress exercised its reserved right of specification and

enacted *Section* 209 *of the Revenue Act of* 1916 to make the lien of *Section* 3186 attach at the date of the decedent's death. This change Congress undoubtedly conceived necessary to forestall claims by beneficiaries of a decedent's estate that distribution freed them of the obligation to apply the distributed property in satisfaction of unpaid estate taxes and to make effective as against such beneficiaries the remedy of distraint. See, *Rosenberg v. McLaughlin*, 66 Fed. (2nd) 271 (C.C.A. 9th). Since a dead man is technically incapable of owning any property, death necessarily marks the transmission of "all property and rights in property, whether real or personal belonging to" the decedent to his personal representative for administration and distribution. Such property and property rights become transmuted into the decedant's "estate". By providing in *Section* 315 (*a*) that the lien imposed by *Section* 3186 should, as applied to estate taxes, attach to the "gross estate" of a deceased taxpayer, Congress merely recognized that transmutation. The adjective "gross" was used to insure that the lien would encompass all of the property comprising the "estate" undiminished by claims arising *inter vivos* which had not become a lien against specific property at the date of death and hence did not reduce the decedent's interest in specific property. Because the estate tax is imposed on an amount which includes the value of property which does not technically belong to the decedent (e. g., property transferred in contemplation of or intended to take effect in possession or in enjoyment at or after death) Congress extended the lien imposed by *Section* 3186 to certain types of such property by enacting *Section* 315 (*b*). It did not, however, extend this lien to property held by the decedent and another, as tenants by the entirety. (See pages 49 to 53 of this brief.)

Section 315 (*a*) specifically limits the duration of the lien imposed by *Section* 3186 to ten years as applied to Estate Taxes. *Section* 3186 does not specifically prescribe the period of enforceability of the lien thereby imposed and Congress apparently deemed it desirable to mark its termination as applied to estate taxes. Presumably it selected the ten-year period as one which would approximate the maximum period of time during which an estate was likely to be in the process of administration.

Section 3186 has remained in force since its passage in 1866 and since 1913 has contained provisions requiring the filing of notice of the lien imposed thereby to make that lien valid as against bona fide purchasers and encumbrancers. *Section* 209 *of the Revenue Act of* 1916 (describing certain attributes of the lien imposed by *Section* 3186 as applied to the collection of Estate Taxes) was reenacted as *Section* 409 *of the Revenue Act of* 1918, as *Section* 409 *of the Revenue Act of* 1921, as *Section* 315 (*a*) *of the Revenue Act of* 1924 and finally as *Section* 315 (*a*) *of the Revenue Act of* 1926. In each of these Revenue Acts there was a provision substantially similar to *Section* 211 *of the Revenue Act of* 1916 making applicable to the taxes imposed by those Revenue Acts provisions of existing law in relation to the assessment and collection of taxes, including *Section* 3186. See *Section* 1305 *of the Revenue Act of* 1918, *Section* 1300 *of the Revenue Act of* 1921, *Section* 1100 *of the Revenue Act of* 1924, and *Section* 1100 *of the Revenue Act of* 1926. What has been said above with respect to the relation between *Section* 3186 and *Section* 209 *of the Revenue Act of* 1916 *applies* equally well to the relationship between the former, and sections reenacting *Section* 209 *of the Revenue Act of* 1916, *including Section* 315 (*a*) *of the Revenue Act of* 1926.

The history of *Section* 315 (*a*) and *Section* 3186 subsequent to 1926 simply serves to confirm our contention that the latter section is the generating source of the lien mentioned in the former.

When Congress adopted the *Revenue Act of* 1928, it was deemed advisable to make specific provision with respect to the manner in which taxpayers might procure releases of tax liens. *Reports of Ways and Means Committee of the House of Representatives* and of the *Finance Committee of the Senate on the Revenue Act of* 1928. The release provisions which Congress finally adopted as part of *Section* 613 (*a*) *of the Revenue Act of* 1928 were added, not to *Section* 315 (*a*). Instead they were incorporated in *Section* 3186 as part thereof and specifically made applicable to all types of Internal Revenue Taxes. It is odd, indeed, if *Section* 315 (*a*) imposes a lien which is separate and distinct from that prescribed by *Section* 3186, that Congress did not amend both sections by specifically adding similar release provisions to each. The explanation of the manner in which Congress made that amendment indicates quite clearly that it regarded *Section* 3186 as imposing a basic lien for all taxes and that it was continuing its policy of building the Federal Statutory Law relating to liens around that provision as a nucleus. It also indicates that Congress conceived *Section* 315 (*a*) as an adjunct to *Section* 3186 and not as a provision separate, distinct and independent of the latter section.

At the time that Congress adopted the *Revenue Act of* 1934, it again indicated that it regarded *Section* 3186 as the generating source of all Federal Tax Liens. Among the recommendations made by the Secretary of the Treasury with respect to the Revenue Act of 1934 was the following:

"At the present time there are two methods provided by law for releasing liens for estate and gift taxes. The authority provided in section 315 (a) of the Revenue Act of 1926 and in section 510 of the Revenue Act of 1932 is fully adequate. The Treasury recommends the elimination of the second method, which is authorized by section 3186 of the Revised Statutes, as amended by section 613 (a) of the Revenue Act of 1928. This amendment would be accomplished by adding to the end of that section the words 'except the lien imposed by section 315 of the Revenue Act of 1926, and the lien imposed by section 510 of the Revenue Act of 1932'."

The underlying assumption of the recommendation of the Secretary of the Treasury was that *Section* 315 (*a*) was a separate, distinct and self-operating section, not in any way related to *Section* 3186. It is significant that Congress rejected this recommendation for it indicates unequivocal Congressional disapproval of the underlying theory of the recommendation.

Before concluding this subsection of the brief, one further significant point should be noted. Respondent's present position that *Section* 315 (*a*) imposes a lien and one which is separate and distinct from that imposed by *Section* 3186 contrasts strangely with the complete absence of even the slightest intimation in the Regulations promulgated by the Commissioner of Internal Revenue interpretative of *Section* 315 (*a*) (and the predecessors of that section in previous Revenue Acts) that such was or would be the position of Respondent.

C

The construction of *Section* 315 (*a*) *of the Revenue Act of* 1926, *as amended* (*Section* 827 (*a*) *of the Internal Revenue Code*) and of *Section* 3186 *of the Revised Statutes* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code*) urged by Petitioner will effectuate a well defined Congressional policy of protecting bona fide purchasers and encumbrancers against the evils of secret tax liens.

We alluded above to the fact that as originally enacted *Section* 3186 contained no provisions requiring notice of the lien imposed thereby to be filed or recorded in order to make the same effective against bona fide purchasers and encumbrancers. While the law stood in this posture, *United States v. Snyder*, 149 U. S. 210, and *United States v. Curry*, 201 F. 371 (D. C. Md.) were decided. Broadly speaking, these cases held that since *Section* 3186 contained no provision requiring the filing or recording of notice of the lien imposed thereby to make it effective against bona fide purchasers and encumbrancers no such filing or recording of notice was necessary. The repercussions of those decisions are well stated by the Circuit Court of Appeals for the Third Circuit in *United States v. Beaver Run Coal Company*, 99 F. (2nd) 610 (C.C.A. 3rd). Speaking of the reason for the amendment of *Section* 3186 to require the filing or recording of notice to make the lien imposed thereby effective against bona fide purchasers and encumbrancers, the Court said:

> "On May 1, 1893, the United States Supreme Court, in the case of *United States v. Snyder*, 149 U. S. 210, held that the lien created by the above section was not subject to the recording laws of

the states, and that it was enforceable even against a subsequent bona fide purchaser for value without notice. This decision cast a cloud of uncertainty upon titles to land throughout the United States and, before long, under the leadership of the American Bar Association, agitation for remedial legislation began. By the Act of March 4, 1913, Congress amended Section 3186 by adding thereto a provision—'that such lien shall not be valid as against any mortgagee, purchaser or judgment creditor until' certain recording and filing requirements, thereafter set forth, had been fulfilled. 37 Stat. 1016."

The amendment in 1913 of *Section* 3186 to require filing or recording of notice of the lien imposed thereby to make it effective against bona fide purchasers and encumbrancers marked the inauguration of a policy of protecting such innocent vendees and mortgagees which Congress has consistently adhered to.

When Congress enacted the *Revenue Act of* 1939, it again reaffirmed its policy of according protection to bona fide purchasers and encumbrancers of property subject to liens for Internal Revenue Taxes by adopting *Section* 401 *of the Revenue Act of* 1939 amendatory of *Section* 3186 which was reenacted as *Sections* 3670 to 3677 *of the Internal Revenue Code. Section* 401 *of the Revenue Act of* 1939 *amends Section* 3672 *of the Internal Revenue Code* to add as subparagraph (b) thereof the following:

"(b) (1) *Exception in Case of Securities.*—Even though notice of a lien provided in section 3670 has been filed in the manner prescribed in subsection (a) of this section, or notice of a lien provided in section 3186 of the Revised Statutes, as

amended, has been filed in the manner prescribed in such section or subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser, of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

"(2) *Definition of Security.*—As used in this subsection the term 'security' means any bond, debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing negotiable instrument; or money.

"(3) *Applicability of Subsection.*—Except where the lien has been enforced by a proceeding, suit, or civil action which has become final before the date of enactment of the Revenue Act of 1939, this subsection shall apply regardless of the time when the mortgage, pledge, or purchase was made or the lien arose."

The reason for the adoption of *Section* 401 *of the Revenue Act of* 1939 is set forth in the *Report of the Ways and Means Committee on Section* 401 *of the Revenue Act of* 1939 in the following language:

"The chief purpose of section 401 is to amend section 3672 by adding a new subsection (b) dealing with securities. * * *.

"The new provisions dealing with securities are considered necessary because of a recent decision of a district court (United States v. Rosenfeld, E. D. Mich., 1938, 26 F. Supp. 433). This case held that a bona fide purchaser for value of shares of stock from a seller against whom a notice of lien for Federal income taxes had been duly filed prior to the sale took subject to the lien even though the purchaser did not have notice or knowledge of such lien. While it is true that the filing of the notice of the tax lien may constitute notice in the case of real property, it is inequitable for the statute to provide that it constitutes notice as regards securities. For example, when a broker purchases a security for his customer on the exchange, it is obviously impossible for him to check all the offices in which a notice of the tax lien may be duly filed to determine whether the security is subject to such lien. A like situation exists with respect to over-the-counter and direct transactions in securities. An attempt to enforce such liens on recorded notice would in many cases impair the negotiability of securities and seriously interfere with business transactions. The adoption of the amendment will remove an existing hardship without causing any undue loss of revenue."

See, also, *The Report of The Senate Finance Committee covering Section* 401 *of the Revenue Act of* 1939.

The adoption of *Section* 401 *of the Revenue Act of* 1939 is important, not only because it reaffirms a clearly defined Congressional purpose to protect bona fide purchasers and encumbrancers, but also because it once again indicates that Congress regards *Section* 3186 as the basic lien provision of the Federal Statutory System.

In amending *Section* 3186 to require the filing or recording of notice of the lien imposed thereby to make

the same effective against bona fide purchasers or encumbrancers, Congress intended to deracinate the evils of the doctrine of *United States v. Snyder*, 149 U. S. 210. See *United States v. Beaver Run Coal Company*, 99 F. (2nd) 610 (C.C.A. 3rd), *supra*. Congress enacted *Section* 401 *of the Revenue Act of* 1939, *amendatory of Section* 3186 *of the Revised Statutes of the United States* (*Sections* 3670 *to* 3677 *of the Internal Revenue Code*) to protect bona fide purchasers and encumbrancers of securities against the lien accorded to Respondent for the collection of Internal Revenue Taxes even though notice of that lien has been filed or recorded as therein provided. See *The Report of the Ways and Mans Committee on Section* 401 *of the Revenue Act of* 1939, *supra*. If the contention advanced by Respondent (and adopted by the District Court and the Circuit Court of Appeals) is sustained and *Section* 315 (*a*) is held to impose a lien separate and distinct from that embodied in *Section* 3186, those clearly enunciated Congressional purposes will be unfulfilled. If the construction urged by Petitioner is adopted, the result sought to be accomplished by Congress is completely achieved. It is hardly reasonable to suppose that Congress left its object but half achieved and singled out the Federal Estate Tax to occupy a preferred position in this regard. To adopt the construction advanced by Respondent would be to thwart a plainly manifested Congressional intent and restore with respect to Estate Taxes (including such taxes on securities) the intolerable situation which existed with respect to all property under the doctrine of *United States v. Snyder*, 149 U. S. 210, *supra*, and with respect to securities prior to the enactment of *Section* 401 *of the Revenue Act of* 1939.

Not only would the decision of the court below if sustained run counter to a well defined Congressional policy, but it would produce absurd and inexplicable results.

Section 315 (*b*) (*Section* 827 (*b*) *of the Internal Revenue Code*, see appendix) would accord to bona fide purchasers and encumbrancers acquiring property from a donee who received the same pursuant to a transfer under which the donor reserved to himself the income for life, complete protection against the lien for Estate Taxes. Yet an innocent vendee or mortgagee from a surviving tenant by the entirety finds his property saddled with a lien. A search for differences justifying such varying treatment is fruitless for no differences exist. The situation of the creator of a tenancy by the entirety and the donor who has reserved the income from transferred property are virtually identical, except that the former has reserved the right to only one-half of the income for life instead of all. *Commissioner v. Hart*, 76 Fed. (2nd), 864 (C.C.A. 6th); *Gessner v. Commissioner*, 32 B.T.A. 1258. The surviving tenant of an estate by the entirety and the donee under a transfer reserving the life income occupy positions which are indistinguishable in terms of substantial rights. Any lack of precise identicalness which may arise from the fact that the surviving tenant must outlive the creator of the tenancy in order to enjoy the fruits of the creator's beneficence is easily eliminated. Assume the retention (which does not in any way affect the operation of *Section* 315 (*b*)) by donor, who has reserved the income for life, of the oft reserved right of reversion in the event of the donee's death prior to that of the donor and the two cases become indistinguishable.

There is nothing in one case which would suggest inquiry into the possibility of unpaid estate taxes which is not equally present in the other. If it be thought that the loss of revenue which might result is sufficient to justify the visitation of the hardship of a secret lien

on a bona fide purchaser from a surviving tenant of an estate by the entirety, it should be remembered that similar considerations should justify a similar depredation with respect to an innocent vendee or mortgagee whose transferor is a donee of property the income from which the donor has reserved to himself. It is unbelievable that Congress should have intended to bring about the arbitrary and capricious result which the interpretation of *Section* 315 (*a*), adopted by the court below, produces.

In the light of the foregoing considerations, the language of the Circuit Court of Appeals for the Third Circuit in *United States v. Beaver Run Coal Co.*, 99 Fed. (2nd) 610, is particularly worthy of note. In that case the court held that the lien of the United States for Federal Income Taxes which had *not* been filed or recorded as provided in *Section* 3186 did not prevail against a purchaser or encumbrancer *even though he possessed actual notice of the claimed lien.* In the course of its opinion the court said:

> "It is a well established doctrine that a clear, unambiguous statute must be literally construed. Hamilton v. Rathbone, 175 U. S. 414, 20 S. Ct. 155, 44 L. Ed. 219; Thompson v. United States, 246 U. S. 547, 38 S. Ct. 349, 62 L. Ed. 876; Crooks v. Harrelson, 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156; Helvering v. New York Trust Co., 292 U. S. 455, 54 S. Ct. 806, 78 L. Ed. 1361. *If an apparently unambiguous statute contains hidden ambiguities, or if a literal construction would clearly defeat the object intended by Congress, or if a literal construction would result in absurdities so gross 'as to shock the general moral sense,' then the courts may be entitled to depart from the strict wording in order to give the statute a reasonable construction. Helvering v. New York Trust Co., supra, Crooks v. Harrelson, supra.*

"In the instant case, however, the literal interpretation of section 3186 does not contain hidden ambiguities, does not defeat the object intended by Congress and does not result in any shocking absurdity. Indeed, any possible absurdity resulting from such an interpretation is far less shocking than the situation existing prior to 1913 when titles to land, which had always been governed by state law, were clouded by the provisions of a federal statute * * *."

(Italics ours)

D

This Court should not follow the erroneous decision of the District Court for the Southern District of California in *United States vs. Security-First National Bank of Los Angeles, et al.*, 30 Fed. Supp. 113, on which the court below relied.

In reaching its decision that the lien herein sought to be foreclosed is entitled to priority over the lien of Petitioner's mortgages, the court below relied almost exclusively on the decision of the California District Court in *United States v. Security-First National Bank of Los Angeles, et al.*, 30 Fed. Supp. 113, appeal dismissed by *Stipulation*, 113 Fed. (2nd) 491 (C.C.A. 9th). That case involved an action by the United States of America to collect its claim for unpaid Estate Taxes through the enforcement of its lien therefor, against a certain parcel of real estate acquired by one of the defendants as the result of the foreclosure of a mortgage made by the estate of a decedent to a bona fide encumbrancer. The decedent had died on February 13, 1926 leaving an estate including the parcel of real estate in question on which a Federal Estate Tax was payable. An Estate Tax return

should have been filed by February 13, 1927. In fact none was filed until February 2, 1933, nearly seven years after the decedent's death. Subsequent to the filing of the return the tax was assessed and appeared for the first time in the April and June 1933 assessment lists. On August 11, 1933, notice of the lien was filed by the collector pursuant to *Section* 3186. The mortgage under which the defendant claimed was made sometime prior to August 11, 1933, but the exact date of the mortgage does not appear. We may safely conclude, however, that the mortgage antedated the filing of the Estate Tax Return by a wide margin. The court held that the lien of the United States for Estate Taxes was entitled to priority over the lien of defendant's mortgage. While that case reaches a conclusion which is in accord with the decision below, the failure of the court to give consideration to the crucial question which both that case and this case present and the bases on which the court rested its decision, counsel this Court to give it little weight as a precedent.

The court in the *Security-First National Bank* case rejected at the outset the contention of defendant's counsel that the lien referred to in *Section* 315 (*a*) did not, as against a bona fide purchaser, attach at the date of the decedent's death. The court, however, conceded that the vital question was not the date on which the lien attached, but whether it was entitled to priority as against a subsequent bona fide purchaser. The defendant in that case then argued that the provisions of *Section* 3186, requiring the recording of notice of the lien imposed thereby (to make it effective against bona fide purchasers and encumbrancers), should be read into *Section* 315 (*a*). The court attempts to answer that argument with the statement that this argument assumes that here can be

but one lien to enforce a tax in favor of the Government. It is doubtful if the argument of the defendant in the *Security-First National Bank* case was so premised. Whether it was or not, however, is immaterial. We concede that Congress has the power to impose a hundred liens for the same tax if it so desires. The real question which this case presents and which the *Security-First National Bank* case presented is not whether Congress has the power to impose two liens for the same tax, but whether it did in fact exercise its undoubted authority in this regard. The court in the *Security-First National Bank* case assumed rather than decided that Congress did assert its prerogative and did impose two separate and distinct liens (one by *Section* 315 (*a*), and one by *Section* 3186). Indeed the crucial question of whether those two sections imposed separate and distinct liens was not even considered by the court for the defendant in that case seems not to have even argued the point. The opinion of the Circuit Court of Appeals in the instant case indicates all too clearly that it give insufficient independent consideration to this pivotal problem and placed implicit reliance on the conclusion of a court which gave it none at all.

The *Security-First National Bank* case quite frankly recognizes the harshness of the result which it reached. The court suggests that its conclusion must be presumed to be in accord with the intent of Congress for that legislative body permitted to remain unchanged for a period of twenty-three years a statute whose defect could have been cured by a simple amendment. This assertion is so completely untenable that it is difficult to conceive how the court could have seriously advanced it. It is true that the statute in question has remained unaltered since

its original enactment, but the failure of Congress to act is hardly a reason for assuming that the result, which the *Security-First National Bank* case reached in 1939, has Congressional approbation. Since the original enactment of *Section* 209 *of the Revenue Act of* 1916 (*the* predecessor of *Section* 315 (*a*)) relatively few decided cases have involved its interpretation, or that of its successors. Prior to *Security-First National Bank* case there was not a single reported decision of a State or Federal Court which even considered the effectiveness of the lien referred to in those sections, against a bona fide purchaser or encumbrancer. Perhaps the great paucity of decisions is accounted for by the fact that it required twenty-three years to toughen Respondent's conscience to the extent necessary for the presentation of the unconscionable argument which it advanced in the *Security-First National Bank* case and again in this case. Whatever may have been the reason, it is clear that Congressional approval cannot be inferred from its failure to alter a statute to avoid the harsh results of a nonexistent interpretation. It is much more reasonable to assume that Congress supposed that *Section* 315 (*a*) would receive the interpretation which Petitioner urges and that its surprise at the decision of the *Security-First National Bank* case was no less complete than that of the Bar.

The final argument of the court in the *Security-First National Bank* case is that its decision may be sustained on grounds of policy. It points out that under the provisions of *Section* 3186 the Collector knows the date of the inception of the lien since the lien takes effect when the assessment list is received and hence the Collector is able to file the required notice immediately upon the accrual of the lien. The same is not true says the court

under the provisions of *Section* 315 (*a*) for the Collector has no way of learning whether an estate tax is due on the date on which the lien accrues without extensive investigation. That argument breaks down completely upon analysis. The Collector knows that under the construction placed on *Section* 315 (*a*) the lien therein referred to has its inception on the death of decedent. The taxes which this lien secures are then owing though not payable until a later date. He does not know the amount of the estate tax, if any, then owing by such decedent, but Congress imposed no requirement that the notice of lien to be valid must specify the amount of the tax. Actually the only fact which the Collector is required to learn to be in full possession of all information necessary to enable him to file notice of the lien is the occurrence of the decedent's death. This information is available to him shortly after the Decedent's death for *Section* 304 (*a*) *of the Revenue Act of* 1926 (*Section* 820 *of the Internal Revenue Code*) enjoins upon an executor the duty of notifying the Collector of the death of the decedent whose estate he is administering. This notice must be filed within two months after the decedent's death or within a like period after the executor's qualification. To conclude that any substantial portion of the decedent's property will have been transferred or mortgaged during the short period of time between death and the giving of this notice is to assume a traffic in the property of decedent's estates which simply does not exist.

Even if it were true that the lien referred to in *Section* 315 (*a*) could not be made effective, without extensive investigation, against the whole world from the moment of its accrual, were the filing of notice required, that is no

reason for assuming that Congress did not intend to require such filing as a condition precedent to effectiveness of that lien against bona fide purchasers and encumbrancers. It has never been the policy of the law to deny protection to an interest merely because such protection would qualify the rights of others. Even the cherished right of free speech has never been held to be absolute on the ground that to recognize any qualification of that right would impair its complete enjoyment.

The fallacy of the final argument of the court in the *Security-First National Bank* case becomes more apparent the more one examines it. The basic assumption of that argument is that Congress by enacting *Section* 315 (*a*) intended to provide Respondent with a lien which can be made effective against the entire world from the date of the accrual of the tax, the collection of which it is designed to enforce. The court points to no actual indicia of such a legislative intent. Indeed, such evidence of Congressional purpose as exists points to a precisely contrary conclusion. The general tax lien statute (*Section* 3186), as applied to income taxes does not accrue from the date of the event, i.e., the receipt of taxable income, which gives rise to the tax. It does not even arise when the tax on that income becomes payable which is approximately seventy-five days after the end of the taxable year during which that taxable income is received. The lien dates from the date on which the assessment list is received by the Collector, which of necessity is subsequent (and, in case of a deficiency, long subsequent) to the time when the tax for which the lien is given, becomes payable. The court in the *Security-First National Bank* case suggests no reason

to support its assumption that a completely different Congressional purpose exists with respect to Estate Taxes. Indeed, it would be impossible to adduce a reason, for the problem and method of collecting estate taxes is precisely the same as that of collecting Income Taxes. Both Income and Estate Taxes become payable at a time subsequent to the date of the occurrence of the event which gives rise to the tax. Income Taxes are payable within approximately seventy-five days after the close of the taxable period during which the receipt of the taxed income occurs. Estate Taxes are payable within fifteen months after the death of the decedent which marks the incidence of the tax. In both cases the taxpayer or his representative is required to file a return of the tax payable and a summary of the facts which form the basis of the computation of the tax. In the case of neither tax will the Collector of Internal Revenue be able to ascertain without extensive investigation whether a tax is payable or its amount, until the taxpayer files the required return. Nor is there less likelihood that funds will be available for the collection of Estate Taxes than for Income Taxes because of the greater probability that the property, out of which Estate Taxes are payable, will be dissipated. Indeed, the reverse is true. Income and accumulated property of a living taxpayer have a much greater tendency to be fluid and to be dissipated than that of a decedent. In addition, the primary fund for the payment of Estate Taxes will be in the hands of a personal representative of a decedent who will be much less likely to squander the fund, not only because he is accountable to a court, but also because he may render himself personally liable for a tax by the dissipation of funds, the use and benefit of which he did

not personally enjoy. In short, if it be assumed that the desideratum is a lien which is best calculated to insure the collectibility of the tax assessed, every reason exists for making the lien for Income Taxes more stringent than that for Estate Taxes. Yet clearly such is not the case for the lien for Income Taxes is hardly such as to insure maximum collectibility. As was pointed out above, the lien does not even arise until long after the tax is payable. It never becomes effective against bona fide purchasers and encumbrancers of securities and it becomes effective against such innocent vendees and lienees of other property only from the time of filing notice. The lien with which Congress has provided Respondent for the collection of Income Taxes is indeed far from a perfect lien. In view of this, it taxes one's credulity beyond all permissible limits to assume that in the case of Estate Taxes, Congress accorded Respondent the perfect lien which dates from the event which gave rise to the tax, and from that moment on, is good against all the world, innocent vendees and mortgagees included. It has never been suggested that the requirement of filing notice of the lien for Income Taxes to make that lien effective against bona fide purchasers and encumbrancers placed the public revenue in jeopardy. Indeed, when *Section* 401 *of the Revenue Act of* 1939 was enacted to provide that the lien imposed by *Section* 3186 should not be effective against bona fide purchasers and encumbrancers of securities, Congress made it clear that it conceived that the benefits accomplished by that enactment far outweighed the evils which might arise from the loss of revenue resulting from that sweeping concession. See *The Report of the Ways and Means Committee on Section* 401 *of the Revenue Act of* 1939 quoted on page 25, *supra*. Any

loss of revenue which might result from according *Section* 315 (*a*), the construction which we urge would be infinitely smaller for that construction would still leave Respondent with a lien for Estate Taxes which has a much wider scope than that for Income Taxes. The adoption of that interpretation would provide Respondent with a lien having its inception at the date of the decedent's death and valid from that date, without the necessity of filing or recording, against the whole world with the exception of persons occupying the status of bona fide purchasers and encumbrancers.

We have felt it necessary to discuss *in extenso* the unsoundness of the bases and the fallaciousness of the hypotheses on which the court in the *Security-First National Bank* case rested its decision because the court below accepted without analysis (as did the District Court in *United States v. Maguire, et al.*, 42 Fed. Supp. 337*) the conclusion reached in that case. The importance of the problem which this case presents and the results which will be produced if the decision of the court below is sustained, merit the fullest consideration of every phase of the arguments here presented, none of which appear to have been urged upon the court in the *Security-First National Bank* case. The brief and almost cryptic opinion of the court below in the instant case indicates all too clearly a failure on its part to analyze completely the questions which this case involves in the light of the *arguments* presented.

(*) In this case the court solely on the authority of *Security-First National Bank* case held that the lien of a judgment based on a claim arising during the decedent's lifetime and rendered subsequent to his death was inferior to the lien of the United State for Estate Taxes not recorded until after the rendition of the judgment.

II. If *Section* 315 (*a*) *of the Revenue Act of* 1926 (*Section* 827 (*a*) *of the Internal Revenue Code*) is construed as imposing a lien which is effective against bona fide purchasers and encumbrancers without the necessity of filing or recordation of notice thereof, that section as so construed violates the Fifth Amendment of the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States lays under interdict action on the part of Respondent which deprives its citizens of their property without due process of law. Primarily and fundamentally that constitutional prohibition is designed to insure the observance by the Government of the United States of the basic principles of fair play in its dealing with its citizens. It marks out a domain where a citizen may seek asylum from the arbitrary and capricious acts of the sovereign which tend to subvert those principles. *Section* 315 (*a*) given the construction adopted by the court below invades that protected zone.

It should be sufficient to bring the section in question within the scope of enactments condemned by the Fifth Amendment that, as interpreted by the Court of Appeals, it accords Respondent a secret lien and sanctions the expropriation of property of an innocent purchaser in satisfaction of taxes owed by another and arising out of a transaction to which the impeccant owner is a complete stranger. A doctrine so replete with unfairness is offensive to the toughest conscience. The vice of the enactment under consideration does not, however, end there. If the construction sanctioned by the decision under review is adopted, we must attribute to Congress an intention of arbitrarily and unreasonably singling out,

as the special object of confiscation, the property of a small segment of a larger class of its citizens all occupying precisely the same legal position.

The value of a decedent's gross estate for Estate Tax purposes includes the value of much property which is not part of his estate for purposes of administration. The property so included has in common the characteristic that death terminates a retained interest which is less than complete ownership. The principal categories into which property of this type falls are the following: (1) Property held by the decedent and another or others as joint tenants or as tenants by the entirety; (2) property subject to a transfer intended to take effect in possession or enjoyment at or after death; (3) property subject to a transfer containing a reserved power to alter or revoke the right of possession or enjoyment; (4) property subject to a transfer containing a reservation or right to income or the right to control the enjoyment thereof during the decedent's lifetime or a period fixed with reference thereto; and (5) property representing the proceeds of insurance payable to a specific beneficiary. *Section* 315 (*a*) provides that the lien therein described shall attach to the decedent's "gross estate" which as is pointed out below the Internal Revenue Code nowhere defines (see pages 49 to 53). *Section* 315 (*b*) extends that lien to all of the property falling into the various categories mentioned above with one exception. That exception embraces property held by a decedent and another as joint tenants or as tenants by the entirety. At another point in this brief (pages 49 to 53) that omission is urged upon this court as indicating that Congress did not intend that the lien for Federal Estate Taxes should extend to jointly held and entireties property. That la-

cuna in *Section* 315 (*b*) has an additional and deeper significance, for if the construction of that section approved by the court below is to prevail, both that section and *Section* 315 (*a*) offend the Fifth Amendment.

Section 315 (*b*) extends the lien described *Section* 315 (*a*) to the property which the former enumerates but limits the operation of that lien with respect to transferees of such property by specifically providing in the following language—

> "* * *. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth."

that the lien shall not be valid as against bona fide purchasers from such transferees. This provision brings into sharp focus the arbitrary and capricious character of the unequal treatment which *Section* 315 (*a*), as construed by the court below, accords to an innocent purchaser from a surviving tenant of an estate by the entirety. If A transfers property to B reserving to himself the income for life and B after A's death sells the property to C, an innocent purchaser, C takes the property free of the lien to which it was subject in B's hands. If, however, A and B had been joint tenants or tenants by the entirety and B, after A's death, sells the property to C, the latter's good faith is no protection to him. He finds that property which he innocently acquired can be wrested from him to pay A's taxes arising

out of a transaction to which he, C, is a complete stranger. This court has frequently called attention to the fact that the Fifth Amendment unlike the Fourteenth contains no provision prohibiting the denial of equal protection of the laws. *LaBelle Iron Works v. United States*, 256 U. S. 377; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1; *Steward Machine Co. v. Davis*, 301 U. S. 548; *Currin v. Wallace*, 306 U. S. 1; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381. It has never denied, however, that discrimination may be so great and unequal treatment so unjustifiable as to constitute arbitrary and capricious action amounting to confiscation which this Court has recognized as offensive to the Fifth Amendment. *Nichols v. Coolidge*, 274 U. S. 531. See also *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1; *Barclay & Co. v. Edwards*, 267 U. S. 442. This Court will search in vain, as have we, for any reason founded on logic or policy which even faintly suggests a ground for denying to a bona fide purchaser from a surviving tenant by the entirety the protection which is so freely accorded to the innocent purchasers from a donee who takes by a transfer of the type described in *Section* 315 (*b*). As interpreted by the court below, the enactment under consideration becomes the very avatar of legislative caprice, offensive to even the most elastic conscience.

This Court, through the late Justice Holmes, has chronicled its doubt as to whether transferees of the type mentioned in *Section* 315 (*b*) can constitutionally be made liable for the tax imposed on the estate of a decedent who is the source of the transferee's title. *Llewellyn v. Frick*, 268 U. S. 238, 251. That uncertainty is magnified where the person sought to be made liable for that tax is an innocent stranger who purchased in good faith from such a transferee and who has no connection with the

transaction giving rise to the tax. Perhaps it was this increased distrust as to constitutionality which was the generating source of the protection which Congress provided for bona fide purchasers from the transferees enumerated in *Section* 315 (*b*) by enacting the portion thereof quoted above. Whatever may have been the basis for the inclusion of this protective clause, it would be unthinkable to suppose Congress intended further to add to this welter of constitutional dubiety by according to one portion of a class of innocent purchasers different treatment from that given a class of such transferees, all similarly situated, whose liability for estate tax this Court has already branded as constitutionally uncertain. It is, however, unnecessary to strike down *Sections* 315 (*a*) and 315 (*b*) as violative of the Fifth Amendment. We submit that Congress intended no such arbitrary and discriminatory action as the decision of the court below attributed to the National Legislative Body by its construction of the enactment under consideration. This Court has construed and should construe the Acts of Congress to avoid, if possible, any doubt as to their constitutionality. *Panama R. R. Co. v. Johnson*, 264 U. S. 375; *Lewellyn v. Frick*, 268 U. S. 238; *Hassett v. Welch*, 303 U. S. 303. The construction of *Sections* 315 (*a*) and 315 (b) which Petitioner urges avoids possible collision between those sections and the Fundamental Law. By interpreting *Section* 315 (*a*) as imposing no lien but as merely describing certain attributes of the lien imposed by *Section* 3186, which requires notice of that lien to be filed to make the same effective against bona fide purchasers, the necessity is obviated of imputing to Congress an intent to arm Respondent with that invidious instrument—a secret lien. In addition, it places on a parity innocent purchasers from a surviving tenant of an estate by the entirety and from the transferees described in *Section*

315 (*b*). The protection of all such bona fide purchasers then rests on the requirement of filing or recording and not on the entirely fortuitous circumstance that the vendor or mortgagor acquired his title by virtue of a transfer intended to take effect in possession or enjoyment at or after death rather than as the survivor of an estate by the entirety.

We are not unmindful of the fact that the second sentence of *Section* 315 (*b*) frees from the lien for estate taxes only property "sold to a bona fide purchaser." It might conceivably be contended that Petitioner is not in a position to object to the inequality (which *Sections* 315 (*a*), as construed by the court below and 315 (*b*) create) because such inequality exists only with respect to purchasers from transferees described in the latter section, and encumbrancers not being included in the latter section are all accorded equal treatment—namely a complete lack of protection. The answer to this question is twofold. In the first place, it is difficult to believe that the word "sold" is to be construed in the narrow sense of an outright transfer of title. Cf. *United States v. Kosebush*, 45 Fed. Supp. 664 (D. C. Wis.). While this question appears never to have been passed upon by the courts, it is fair to assume that Congress intended, in view of its consistent policy of protecting both purchasers and encumbrancers (see pages 23 to 31 of this brief) that the words "sold to a bona fide purchaser" should include a mortgage to a bona fide encumbrancer. Indeed, a mortgage may be brought within the precise wording of the statute for as a matter of legal theory a mortgage has been sometimes regarded as a sale upon a condition subsequent. However, it is not necessary to

resort to such formalism for the courts have indicated that substantially similar language, namely, "a bona fide sale for an adequate and full consideration in moneys worth" used in several places in *Section* 811 *of the Internal Revenue Code* embraces transactions which are not sales in the narrow sense of that term. See *Root, et al., Executors v. United States*, 56 F. (2nd) 857 (D. C. Fla); *Estate of Warner D. Hunt v. Commissioner*, 19 B.T.A. 624 (Acq.) *Goldman, et al., Executors v. Commissioner*, 11 B. T. A. 92 (Acq.). In the second place, Petitioner is a purchaser of the property which is the subject-matter of this suit. Its initial connection with that property was as mortgagee but those mortgages were foreclosed and at the foreclosure sale Petitioner became the purchaser. The fact that the sale was upon the foreclosure of Petitioner's mortgages is immaterial, so far as the present controversy is concerned. This Court has itself said that for purposes of Federal Taxation such a sale is to be treated as any other sale. *Helvering v. Hammel*, 311 U. S. 504.

The constitutionality of *Section* 315 (*a*) has never been adequately explored. The question was not raised in either *United States v. Security-First National Bank of Los Angeles, et al.*, 30 Fed. Supp. 113, *appeal dismissed* 113 Fed. (2nd) 491 (C.C.A. 9th), or *United States v. McGuire, et al.*, 42 Fed. Supp. 337. Indeed, the same constitutional question, as is presented in this case, could have been raised in neither. In the former case the mortgagor was the estate, not as in the instant case, a transferee of the same general class as those described in *Section* 315 (*b*). The same is true of the latter case for there the encumbrancer was an unsecured creditor of

the decedent at the time of his death whose lien arose by virtue of the reduction of that claim to judgment subsequent to death but prior to the filing by the Government of notice of its lien. In *United States v. Snyder*, 149 U. S. 210 no question of constitutionality was presented. That case dealt solely with the question of the relative priority of the lien imposed by *Section* 3186 (prior to its amendment to require filing or recording of notice to make it effective against bona fide purchasers) and that of a mortgage acquired in good faith and for value. This Court stated that the single question presented for its consideration was "whether the tax system of the United States is subject to the recording laws of the states" and that was all that this Court decided.

The District Court, on the constitutional issue, assumed rather than decided that *Section* 315 (*a*) given the construction which it accorded to that section, did not violate the Fifth Amendment (R. 240-243). The Circuit Court of Appeals expressly decided in favor of constitutionality but its decision is marked by almost a complete absence of any discussion of the point (R. 295). It apparently was of the opinion that the provisions of *Section* 313 *of the Revenue Act of* 1926 (*Sections* 825 (*a*) *and* 827 (*c*) *of the Internal Revenue Code*) were sufficient answer to the argument of unconstitutionality. The provisions relied upon by the Court of Appeals are substantially to the following effect: The executor may apply for a prompt determination of the amount of Estate Tax payable by the estate in his charge. Within one year from the date of such application (or if the application is made before the return is filed, then within one year from the date on which the return is filed), the Commissioner is required to determine the amount of tax. Upon the payment by

the executor of the amount of the tax so determined, the executor is released from personal liability. This payment, however, does not release any part of the gross estate from the lien for any deficiency in tax subsequently determined, except where title to such part of the gross estate has passed to a bona fide purchaser. The court below seems to have reasoned that since these provisions afforded Petitioner a procedure for protecting itself against the lien of the Government, it may not complain, not having resorted to this procedure, that its property is appropriated in satisfaction of that lien. The difficulty with this argument is that its premise is false for Petitioner could not have availed itself of these provisions even if it had desired to do so. The application for a prompt determination of the tax under *Section* 313 *of the Revenue Act of* 1926 must be made by the *executor* and by him alone. Petitioner could not, therefore, have made the application. The same was true of its mortgagor, who was not the executor of Mr. Paul's estate, but the surviving tenant of an estate in specific property which she and John P. Paul held as tenants by the entirety. It is, therefore difficult to conceive how either Petitioner or its mortgagor would have been able to avail themselves of the suggested panacea. Conceivably a surviving joint tenant or the survivor of a tenancy of the entireties might be able to prevail on an executor to make application for the determination. There is nothing certain about this procedure, however, for there is no way in which the executor can be compelled to make the required application. It is not difficult to conceive of a case where a hostile or indifferent executor would ignore such a request on the part of a surviving tenant. It is likewise not difficult to envisage a situation where a decedent would have no estate subject to administration

and hence no executor could be appointed. Under such circumstances a surviving tenant would be helpless. A protection dependent on so many contingencies is illusory and an illusory protection is hardly an adequate substitute for the aegis which *Section* 315 (*b*) affords to innocent purchasers from other transferees of a decedent.

Quite apart from what has been said in the preceding paragraph, it is extremely doubtful whether an application under *Section* 313 *of the Revenue Act of* 1926 would have accorded effective protection to Petitioner. That section discharges the executor from personal liability. However, the complementary provisions of that section do not operate to release any part of the gross estate from the lien unless (1) "the title to such part of the gross estate has passed" and (2) "to a bona fide purchaser for value." Respondent concedes, and there can be no doubt, that Petitioner as a mortgagee without notice is a bona fide purchaser. However, under the laws of the State of Michigan it is well settled that no title passes to a mortgagee. See *Ladue v. The Detroit & Milwaukee R. R. Co.*, 13 Mich. 280, 394; *Dawson v. Peter*, 119 Mich. 274, 280, 77 N. W. 997; *Equitable Trust Co. v. Milton Realty Co.*, 263 Mich. 673, 676, 249 N. W. 30. This argument cannot be lightly dismissed on the ground that the statutory language may be broadly construed. Congress in enacting *Section* 313 did not phrase this release provision in the elastic language of sale or transfer. Instead it expressly made the divestiture of the lien dependent on whether "title has passed." Respondent may protest that it would never have taken such a position. The present case, however, is proof that Respondent neglects no contention, however inequitable, in seeking to enforce its lien for taxes.

III. The lien herein sought to be foreclosed does not in any event extend to any of the property herein involved in which John P. Paul at the time of his death possessed an interest as a tenant by the entirety.

Even though this Court should sustain the conclusion that Respondent's lien for Estate Taxes is valid against bona fide purchasers and encumbrancers still that lien would be enforceable only against such of the property as was not held by John P. Paul and his wife as tenants by the entirety at the time of the former's death.

Property passing to a surviving tenant of an estate by the entirety is not part of "the gross estate" of a decedent as that term is used in *Section* 315 (*a*). The statutes of the United States nowhere define the term "gross estate." *Section* 302 *of the Revenue Act of* 1926, *as amended* (*Section* 811 *of the Internal Revenue Code*) dealing with the concept of a decedent's gross estate does not attempt to define that concept. It simply provides that "the *value* of the gross estate of the decedent shall be determined by including the *value* at the time of" the decedent's death "of all property, real or personal, tangible or intangible, wheresoever situated, except real property situated outside of the United States, to the extent of the interest therein of the decedent at the time of his death." That section then proceeds to enumerate other property which does not form a part of a decedent's estate for purposes of administration, the value of which is included in determining the gross amount upon which a tax is payable. Property of this latter class embraces property in which a decedent at the time of his death had an interest as a tenant in the estate by the entirety. Except for specific provision (of

Section 302 *of the Revenue Act of* 1926, *as amended*, (and its predecessors) requiring the inclusion (in computing the value of a decedent's gross estate) of the value of the property therein described which is not subject to administration, the value of such property would not be includable even under the broad language of *Section* 302 (*a*) *of the Revenue Act of* 1926 (*Section* 811 (*a*) *of the Internal Revenue Code*). See *Helvering v. Safe Deposit & Trust Co.*,....... *U.S.*...... 62 *S. Ct.* 925 (*decided April* 13, 1942); *Porter v. Commissioner*, 288 U. S. 436; *Davis v. United States*, 27 *Fed. Supp.* 698; *Estate of Gertrude L. Royce v. Commissioner*, 46 *B.T.A. No.* 147. The words "gross estate" have no inherent significance broad enough to include the interest of a decedent in property held by him and his surviving spouse as tenants by the entirety or in any property not subject to administration. The word "estate" clearly connotes only property subject to administration and the word "gross" simply serves to indicate that the estate without deduction for claims which have not become a lien against specific property at the date of a decedent's death is intended. The words "gross estate" as used in *Section* 315 (*a*) must have been intended only to embrace property which is taxable under *Section* 302 (*a*) *of the Revenue Act of* 1926. Congress was fully cognizant of that inherent limitation of those words for had they been broad enough to encompass taxable property which is not subject to administration, *Section* 315 (*b*) would have been wasted legislative effort. This is made abundantly clear by the fact that as Congress amended *Section* 302 *of the Revenue Act of* 1926 (and its predecessors) to provide for the inclusion of the value of different types of property, not subject to administration, in the value of a decedent's gross estate, it amended *Section* 315 (*b*) (and its

predecessors) to extend the lien to such newly added property. See *Section* 402 (*f*) *of the Revenue Act of 1918*, taxing the value of the proceeds of insurance in excess of $40,000 payable to a specific beneficiary and *Section* 409 *of the Revenue Act of* 1918 extending the lien for the tax to such proceeds and *Section* 803 (*a*) *of the Revenue Act of* 1932 amending *Section* 302 (*a*) to tax transfers under which the grantor reserved the income for life and *Section* 803 (*b*) *of the Revenue Act of* 1932 amending *Section* 315 (*b*) to extend the lien to such enwly included property. This legislative history is significant in determining the property to which the lien for the tax extends. *John Hancock Mutual Life Insurance Co. v. Helvering*, 128 Fed. (2nd) 745 (App. D.C.).

The lien referred to in *Section* 315 (*a*) extends to the decedent's "gross estate." Yet Congress deemed it essential to provide specifically and in clear and unmistakable terms that such lien should extend to four different types of property, the value of which is included in the value of decedent's gross estate but is not subject to administration. (See pages 40 to 43 of this brief). The attributes of entireties and jointly held property are precisely the same as those of property described in *Section* 315 (*b*). The only ground on which can be predicated the failure of Congress specifically to describe jointly held property and property held in an estate by the entirety in *Section* 315 (*b*) is that Congress did not intend the lien referred to in *Section* 315 (*a*) to attach to such property. That the exclusion of entireties property from *Section* 315 (*b*) is not accidental is attested by the fact that that section does not extend to other taxable property not subject to administration, e. g. dower and curtesy interests and property passing under a general power of appointment. However, whether this omission was inten-

tional or unintentional, we need not inquire. The important thing is that Congress did not subject property of this type to a lien, and because of that failure, no lien attaches to such property. It is well settled doctrine that the legislative intent to subject property to a lien for taxes must clearly appear and that such a lien will neither be created by implication nor enlarged by construction. *Andrew v. Munn*, 205 Iowa 723, 218 N. W. 526; *Little River Drainage District v. Houck*, 206 Mo. App. 283, 226 S. W. 72; *Archibald v. Maurath*, 92 N. J. Eq. 357, 113 A. 6.

The Circuit Court disposed summarily of the argument under this head with the citation of *Goodenough v. Commissioner*, 83 F. (2nd) 389 (C. C. A. 6th); *Robinson v. Commissioner*, 63 F. (2nd) 652 (C. C. A. 6th). Neither of these cases deal remotely with the problem here under consideration. They deal solely with the question of whether the value of entirety property is included in the value of decedent's gross estate. The question of whether such property is subject to a lien for estate taxes was neither presented nor decided in either case.

CONCLUSION

To sustain the decision of the court below is to perpetuate a doctrine which bristles with inequity. For Petitioner it means a loss to the extent of the tax, plus interest, payable by another, in a transaction to which it was a stranger. If Petitioner pays the tax to protect the mortgaged property which it acquired upon foreclosure, it will be poorer to the extent of its payment—an additional payment for which it never bargained. If it is unable to pay the tax, it may lose its entire investment which is many times the amount of the tax. What

is more significant, however, is that for estates generally it will mean an absolute inability to secure loans at a time when mortgage money is a vital necessity—to pay debts, taxes and other expenses incident to administration. No lender will be willing to assume for ten years the risk that his property may be confiscated to satisfy the secret lien of the taxing sovereign which may be asserted long after all liability for estate tax has apparently been finally settled. The instant case eloquently attests the fact that such a risk is a real threat during every moment of the ten-year period for here the lien was asserted just one day short of the tenth anniversary of John P. Paul's death. For Respondent it will be a Pyrrhic Victory. It will have collected the tax in the instant case but for this small gain it will sacrifice liquidity in countless estates yet to be taxed.

If Respondent prevails it will mean that every lender who advanced money on, or purchased, property which formed a part of the estate of a decedent who died within the last ten years will be faced with having his security or his purchase wrested from him to satisfy estate taxes as yet unassessed, payable by the estate of an individual with whom he has had no contact whatsoever. No amount of good faith will protect him. Nor can he console himself if the property on which he has a lien or which he purchased consists of negotiable securities. If the doctrine of the Court below is sustained real and personal property, negotiable securities and even money are equally vulnerable.

The instant case involves an incumbrancer whose mortgagor is a surviving tenant of an estate by the entirety. The next may involve the mortgagee or purchaser of property which has passed through the hands of numerous bona fide purchasers. Under the doctrine of

the court below the lien of such mortgagee or the title of such purchaser must yield precedence to Respondent's lien. This is true even though, as in the instant case, the full amount of the tax has apparently been paid and the additional tax is not asserted until a succession of bona fide purchasers have bought and sold on the basis of a perfect record title. All this means nothing for Respondent may wait, as it did in the case at bar, until the hands of the clock are poised to strike the hour which marks the end of the decade of the lien's existence with complete assurance of being able to wrest the property, whether it be real estate or negotiable securities, from its innocent and bewildered possessor. If the decision of the court below is sustained, Respondent's lien indeed becomes the sword of Damocles but without even the saving grace of the restraining hair.

No amount of investigation can dispel the cloud of uncertainty in which the Court of Appeals' decision wraps all titles. In the case of securities, such as stocks and bonds, it would be virtually impossible even to ascertain whether title was traceable to the estate of a decedent who died within ten years of their acquisition. The ~~evils~~ implicit in such a doctrine were recognized by Congress and it aimed its shaft at those vices when it enacted *Section* 401 *of the Revenue Act of* 1939. (See pages 24 and 27 of this brief). The decision by the court below atrophys that effort and again clogs the channels of trade.

Where the lien for estate taxes involves real property, the abstract of title, on the basis of which title opinions are given and on the basis of which transactions running annually into the billions are consummated, is next to useless. The abstract would disclose that the estate of a

decedent was the source of title and nothing more. It would not disclose the extent of the decedent's taxable estate, whether a return was filed, whether a tax was paid, or any of the essential facts. Even if a purchaser were to examine the inventory of the decedent's estate and that inventory disclosed a taxable estate having a value less than the specific exemption, he could still not safely purchase the property or lend on it as security. Such an inventory would not disclose jointly held or entireties property, gifts in contemplation of death, gifts intended to take effect in possession or in enjoyment at or after death, *inter vivos* transfers subject to a reserved power to alter the right of possession or enjoyment, property passing under a general power of appointment, interests of dower and curtesy or insurance payable to specific beneficiaries. The investigation necessary to determine the existence of such property with sufficient certainty to satisfy a careful title examiner would require a long and arduous search. Even after such a search the giving of a title opinion would be fraught with considerable hazard since one could never be quite certain that all of the necessary facts had been ascertained.

There is an utter lack of realism in the suggestion of the court below that *Section* 313 (*a*) *of the Internal Revenue Act of* 1926, *Section* 825 (*a*) *of the Internal Revenue Code* (which provides a limited protection for bona fide purchasers and incumbrancers who become such after assessment is made as a result of a request pursuant to that section), provides a solution to the dilemma with which that court's decision confronts borrowers and lenders and sellers and purchasers. If a request for an assessment pursuant to the section is made, the Commission-

er is required to make an assessment within one year from the receipt of the request, *if a return has been filed.* If the request is made before the return is filed, the Commissioner is required to make the assessment within one year from the time the return is filed. The Estate Tax Return must be filed and the tax paid within fifteen months after the date of the decedent's death. The mounting Estate Tax rates of the past several years and the future increases in prospect due to the exigencies of the present World War make it a virtual certainty that few estates will escape the necessity of borrowing on the security of or selling a portion of the property comprising the estate to pay whatever taxes may be due. If the decision of the court below is correct, a prospective purchaser or lender cannot safely consummate his purchase or loan until an assessment pursuant to *Section* 313 has been made. This means that in order to be sure of having funds with which to pay the tax on the due date, a return must be prepared and filed and an application for an assessment pursuant to *Section* 313 must be made not later than three months after the decedent's death. In any case where the estate is sizable, this is a formidable task. In many cases it would be virtually impossible.

However, the difficulty does not end here. *Section* 811 (*j*) *of the Internal Revenue Code* permits the executor of a decedent's estate to value the gross estate for Estate Tax purposes as of a date one year after the decedent's death instead as of the date of death. The right to select the optional value is extremely important and unless this right may be exercised the tax in many cases would be more than the value of the estate. This right can be exercised only by an election made by

the executor in the Estate Tax Return. If the executor is required to borrow on the security of or sell property comprising the estate to pay the tax, he must forego the right of optional valuation in order to pay the tax on time. This is true because to be sure that an assessment will be made under *Section* 313 in time to permit him to consummate a loan or sale in time to pay the tax fifteen months after the decedent's death, he is required to file both a return and a request for an assessment pursuant to that section not less than three months after the decedent's death. If the executor wishes to avail himself of the right of optional valuation, it is a manifest impossibility to file a return until one year after death. In this event, even though a request for an assessment pursuant to *Section* 313 has been previously made, the Commissioner has one year from the date of the filing of the return within which to make the assessment. The executor, if he is forced to rely on the provisions of *Section* 313 is thus in this position: If he would be sure of paying the tax on the due date, he must forego the right of selecting the optional valuation date and perform the difficult, if not virtually impossible, task of preparing a return within three months after the decedent's death. On the other hand, if he wishes to avail himself of the privilege of optional valuation, he is in the unpleasant position of having to default in the payment of the tax. It is, of course, true that the executor may be able to prevail upon the Commissioner of Internal Revenue to grant him an extension of time within which to pay the tax. See *Section* 822(*a*)(2) *of the Internal Revenue Code*. If the executor is successful, he is then faced with the prospect of having to furnish security for the payment of the unpaid tax, and in addition is required to pay interest thereon at the rate of four per cent (4%) per annum.

Sections 822(*a*)(2) *and* 890(*a*) *of the Internal Revenue Code.* Thus, even though the executor may think it advisable to sell rather than to borrow, he is forced in effect to borrow and at interest rates and on terms which may be considerably more onerous than could have been obtained from a private lender.

Even if an executor is willing to forego the right of optional valuation and is able to file an Estate Tax Return and a request for an assessment pursuant to *Section* 313 promptly after the decedent's death, he is still beset with problems. Loans and sales can be made only on the basis of conditions which exist at a given time. Yet a prospective purchaser or lender must insist for his protection, if the decision of the court below is correct, on compliance with *Section* 313. In an estate of any size, the investigation which the Commissioner would be required to make, might and probably would consume the greater part of the allotted year. Few prospective purchasers or lenders in a constantly changing world would be willing to keep their commitments open until the Commissioner had acted. Consider, for example, the difficulty (if not the impossibility) of trying to market a block of corporate stock, the market price of which may change hourly. By the time the Commissioner has accomplished his investigation an advantageous sale may no longer be possible. Indeed, the stock which might have been sold for more than enough to pay the entire tax may have become completely unmarketable.

Respondent does not need the all embracing protection which the decision of the court below accords it. It is absurd to suggest that but for this protection dishonest taxpayers could forestall collection by fraudulent sales and mortgages. Such purchasers and encumbrancers

would not be entitled to protection either because of their guilty knowledge or because they parted with no value. Fraud is hardly so rampant as to justify the infliction of such incalculable hardship on the many innocent vendees and lienees who will be affected. Respondent will sustain no injury if the doctrine of the court below is rejected for the proceeds of the mortgage or sale presumably become immediately subject to the lien. In fact Respondent's position may be improved since the proceeds will be liquid while the property sold or mortgaged (such as land) may not.

The logical implications of the decision of the court below produce results which verge on the fantastic. If that decision is correct the property on which Petitioner took a mortgage and of which it later became Purchaser at the foreclosure sale, is subject to respondent's lien. What, however, of the proceeds which Petitioner's mortgagor received as a result of the mortgage? There is no provision of law which expressly subjects those proceeds to the lien as there is in the case of other types of property, the value of which is included in the value of the decedent's gross estate for estate tax purposes, but which is not part of his estate for purposes of administration. *See Section* 827 (*b*) *of the Internal Revenue Code.* If this is correct, then the Petitioner's position is worse than that of its mortgagor, for the property on which it took a mortgage is subject to the lien, but the proceeds of that mortgage are not. Should these proceeds be invested in property which is later sold to a bona fide purchaser it would follow that since the proceeds of the mortgage are not subject to the lien the property in which they are invested is also free of lien. Thus, because Petitioner happened to be the first bona

fide purchaser, instead of the second, it finds itself without protection. Here is arbitrary and capricious treatment incarnate. If it be assumed, on the other hand, that the proceeds of the mortgage which Petitioner made became subject to a like lien which petitioner finds asserted against the property which it acquired in good faith, it should follow that any property into which those proceeds are subsequently converted is also subject to the lien. On this theory Respondent's position improves with each successive purchase and sale by the original holder of the property liable for the tax, for each adds to the pool of property against which Respondent can enforce its lien. Assume that instead of having taken a mortgage on property which belonged to a surviving tenant of an estate by the entirety, Petitioner had loaned its money on the security of property which its lienor had acquired by a transfer intended to take effect in possession or enjoyment at or after death. Petitioner would then have been protected under the provisions of *Section* 827 (*b*) *of the Internal Revenue Code* but the proceeds of the loan are subject to the lien. If those proceeds are invested in property, does that property become subject to the lien which attached to the proceeds used in its acquisition? Presumably it does, and thus in this instance the second bona fide purchaser is subject to the same misfortune which would have befallen the first had his transferor acquired the property from a surviving tenant of an estate by the entirety.

Only a few of the astounding results which flow from the decision of the court below are catalogued in the preceding paragraph. Others are not difficult to conceive. How, for example, does the lien, under the doctrine of the court below, affect a bona fide purchaser of property which a decedent did not own at the time of his death,

but which subsequently comes into the hands of the executor as a result of a purchase, partly with the proceeds of the sale of property which the decedent owned at the time of his death, partly with income derived from property purchased with cash which the decedent owned at the time of his death, and partly with money derived from a contingent remainder which the decedent owned at the time of his death, but which did not ripen into possession until subsequent to his demise. He who can solve the riddles which the decision of the court below poses, must indeed be capable of a ratiocination of the irrational.

A good government is one which not only insures fair dealing between man and man but which also observes the principles of fair play in its dealings with its citizens. The three branches of the Government of the United States have scrupulously adhered to these precepts in all fields of activity but nowhere more meticulously than in the field of taxation. That being so, is it fair to assume that Congress deviated from this policy by prescribing, as the procedure for the collection of Estate Taxes, a secret lien calculated to trap the unwary? The question admits of but one answer—the assumption is unthinkable. The rejection of that assumption means the reversal of the decision of the court below. The construction of *Section* 315 (*a*) urged by Petitioner is based upon the fundamental principle that Congress intended to incorporate in the system which it enacted for the collection of Estate Taxes, the principles of fairness on which all action of a Democratic Government should proceed. Every compelling reason of policy, fairness and justice counsel this Court not to allow *Section* 315 (*a*) to continue, as it is under the decision of the court below, "an unfocused threat" to the property of countless innocent persons throughout the United States.

We respectfully submit that this Court should reverse the decision of the Circuit Court of Appeals and should direct the entry of a decree providing that the lien of the Respondent is subordinate and inferior to the title of Petitioner with respect to all of the property herein involved.

Respectfully submitted,

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APPENDIX

Section 3186 *of the Revised Statutes of the United States* (*Act of July* 13, 1866, *c.* 184, *Sec.* 9, 14 *Stat.* 107 *as revised and amended by an Act of March* 1, 1879, *c.* 125, *Sec.* 3, 20 *Stat.* 331) *as amended by Act* 451, *March* 4, 1913 (*c.* 166, 37 *Stat.* 1016) *by an Act of February* 26, 1925, *c.* 344, 43 *Stat.* 994, *by Section* 613 *of the Revenue Act of* 1928, *by Section* 509 *of the Revenue Act of* 1934 *and Section* 401 *of the Revenue Act of* 1939, *now known as Sections* 3670 *to* 3677 *of the Internal Revenue Code,* as amended, reads as follows:

"§3670. Property subject to lien

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

"§3671. Period of lien

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

"§3672. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors

(a) *Invalidity of Lien without Notice.*—Such lien shall not be valid as against any mortgagee,

pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) (1) *Exception in Case of Securities.*—Even though notice of a lien provided in section 3670 has been filed in the manner provided in subsection (a) of this section, or notice of a lien provided in section 3186 of the Revised Statutes, as amended, has been filed in the manner prescribed in such section or subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase, such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

"(2) *Definition of Security.*—As used in this subsection the term 'security' means any bond, debenture, note, or certificate, or other evidence of

indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

"(3) *Applicability of Subsection.*—Except where the lien has been enforced by a proceeding, suit, or civil action which has become final before the date of enactment of the Revenue Act of 1939, this subsection shall apply regardless of the time when the mortgage, pledge, or purchase was made or the lien arose."

"§3673. Release of lien

Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the collector charged with an assessment in respect of any tax, may issue a certificate of release of the lien if—

(a) *Liability Satisfied or Unenforceable.* The collector finds that the liability for the amount assessed, together with all interest in respect thereof, has been satisfied or has become unenforceable by reason of lapse of time; or

(b) *Bond Accepted.* There is furnished to the collector and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified in the regulations."

"§3674. **Partial Discharge of Property**

(a) *Property Double the Amount of the Liability.* Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the collector charged with an assessment in respect of any tax may issue a certificate of partial discharge of any part of the property subject to the lien if the collector finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the liability remaining unsatisfied in respect of such tax and the amount of all prior liens upon such property.

(b) *Part Payment.* Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the collector charged with an assessment in respect of any tax may issue a certificate of discharge of any part of the property subject to the lien if there is paid over to the collector in part satisfaction of the liability in respect of such tax an amount determined by the Commissioner, which shall not be less than the value, as determined by him, of the interest of the United States in the part to be so discharged. In determining such value the Commissioner shall give consideration to the fair market value of the part to be so discharged and to such liens thereon as have priority to the lien of the United States."

"§3675. **Effects of certificates of release or Partial Discharge**

A certificate of release or of partial discharge issued under this subchapter shall be held conclusive that the lien upon the property covered by the certificate is extinguished."

"§3676. **Single Bond Covering Release of Lien and Payment of Income Tax Deficiency**

The Commissioner, with the approval of the Secretary, may by regulation provide for the acceptance of a single bond complying both with the re-

quirements of Section 272 (j) (relating to the extension of time for the payment of a deficiency) and the requirements of subsection (b) of section 3673."

"§3677. Extended Application for Provisions Relating to Release or Partial Discharge

Sections 3673, 3674, 3675, and 3676 shall apply to a lien in respect of any internal revenue tax, whether or not the lien is imposed by this subchapter."

Section 315 *of the Revenue Act of* 1926, *as amended by Section* 613 (*b*) *of the Revenue Act of* 1928 *and by Sections* 803 *and* 809 *of the Revenue Act of* 1932, *now known as Section* 827 *of the Internal Revenue Code* reads as follows:

"§827. Lien for Tax

(a) *Upon gross estate.* Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) *Upon Property of Transferee.* If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession and enjoyment of, or the right to the income from, the property, or (B) the right either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the

tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

(c) *Continuance after Discharge of Executor.* The provisions of section 825 shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless the title to such part of the gross estate has passed to a bona fide purchaser for value, in which case such part shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser by the heirs, legatees, devisees, or distributees."